No. 239

In the Supreme Court of the United States

October Term, 1939

ABE FISCHER, *Petitioner,*

vs.

PAULINE OIL & GAS COMPANY, *Respondent.*

PETITION FOR REHEARING

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SUBJECT INDEX

TABLE OF CASES

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PETITION FOR REHEARING

Comes now Pauline Oil & Gas Company, respondent, and prays the Court to grant a rehearing in the above cause and withdraw the opinion filed herein on the 26th day of February, 1940, written by Mr. Justice Roberts; and respondent further prays that the issuance of mandate herein be stayed pending the consideration of its petition.

The respondent, Pauline Oil & Gas Company, in support of its petition for rehearing, states the following reasons:

FIRST

The Supreme Court of Oklahoma, whose interpretation in such a matter is controlling, has held without exception that jurisdiction of the court on hearing to confirm sale of land made under general execution issued on judgment is confined to inquiry as to the regularity of proceedings on

sale, and order confirming sheriff's sale is not an adjudication that the land was lawfully subject to sale. Therefore, the opinion herein erroneously holds, on a matter not presented by the briefs herein, that the final and prior decision of the District Court of Pawnee County, made and entered on March 28, 1936, confirming the sheriff's sale under execution of the property involved to Abe Fischer, petitioner, and overruling the objections thereto of the trustee in bankruptcy, and granting to the trustee in bankruptcy an exception to its action, extended not only as an estoppel to the trustee, but to the respondent as his transferee, as to the contention that the property involved herein was not subject to levy and sale.

SECOND

The petitioner, Abe Fischer, in his petition for rehearing, presented to the Supreme Court of the State of Oklahoma the issue that the order confirming sale, unappealed from by the trustee in bankruptcy, was res adjudicata as to whether the property involved herein was subject to levy and sale. His petition was denied by the Supreme Court of Oklahoma. The opinion herein has therefore invaded the province of the State Supreme Court in its interpretation of its own local statute.

THIRD

The opinion herein is erroneous in not affirming the decision of the Supreme Court of Oklahoma in favor of this respondent. This is true for the following reasons:

The opinion held that the right of action, if any, to set aside an alleged fraudulent transfer and assignment for the

benefit of creditors, under which this respondent claims title, vested solely in the trustee in bankruptcy. The opinion held that "the trustee's acquiescence in the confirmation of the sale to the respondent would seem to be at least a tacit assertion that the levy of execution did not constitute an encumbrance upon respondent's title." The opinion held that the respondent, Pauline Oil & Gas Company, was the transferee of the trustee in bankruptcy. The opinion held that Section 67 (f) of the Bankruptcy Act avoids liens created within four months of bankruptcy as against the trustee and those claiming under him, but only in case the bankrupt was insolvent at the time and the lien claimant was not an innocent purchaser for value. In this connection the opinion states that in the trial of this cause as between the lien claimant, the petitioner, Abe Fischer, and this respondent, Pauline Oil & Gas Company, claiming under the trustee in bankruptcy, the facts disclose the insolvency of the bankrupt since October 11, 1934, when assignment of its property for the benefit of creditors was made and was not questioned, and that notice of the adjudication in bankruptcy was read at the sale on execution in the presence of Abe Fischer, petitioner and lien claimant.

Therefore, this respondent is brought squarely within the terms of Section 67 (f) as one holding under the trustee in bankruptcy. The bankrupt having been insolvent at the time of the creation of the lien, and the lien claimant, Abe Fischer, not being an innocent purchaser for value, and under the interpretation of the Supreme Court of Oklahoma the respondent not being estopped by order confirming sale in claiming that the property was not subject to sale, judgment should have been for the respondent.

ARGUMENT

PROPOSITION

The judgment confirming the sheriff's sale on execution and overruling the objections of the trustee in bankruptcy to confirmation, is not of such a nature as would bar the assertion of the respondent in this action that the property was not subject to seizure and sale.

In support of the foregoing, we quote from the body of the opinion in the case of *Cherry et al.* v. *Godard et al.*, 179 Okl. 158, 64 P. (2d) 315, as follows:

> "In this state sales of land upon either general or special execution are required to be confirmed by the court. Section 456, O. S. 1931. Such confirmation is a judicial act and, as such, is entitled to and accorded some curative effect. See Dixon v. Peacock et al., 43 Okl. 87, 141 P. 429; Morgan v. Stevens et al., 101 Okl. 116, 223 P. 365. However, this judicial act of confirmation is not ordinarily given the same standing as is attributed to a decision upon carefully framed issues and pursuant to a formal notice. The reason for this limitation upon its standing in the field of judicial decisions is the limited scope of the inquiry and the recognized fact that such order of confirmation is frequently entered in an ex parte manner. As was said by the Kansas court in the case of Brewer et al. v. Warner, 105 Kan. 168, 182 P. 411, 413, 5 A. L. R. 385:
>
> > '*In the case of a sale under general execution the sheriff does not act as the agent of the court.* The court has not specified the property or adjudicated the lien, and has not otherwise been concerned with the course which the sheriff shall pursue. In executing the process the sheriff has no guidance but the law, and takes his chance of

finding and levying on property which is not exempt.

'The purchaser at a sheriff's sale is not an innocent purchaser. He knows the limitations on the sheriff's power, and buys what the sheriff can sell, and no more. When the sheriff's return of sale comes before the court for confirmation, the proceeding may be, and commonly is, ex parte. Confirmation may take place on the motion of the sheriff, or of the purchaser, or on the court's own motion, and at any time, without notice to anybody. Confirmation usually follows an inspection of the writ and the return, and, so far as the record discloses, confirmation in this case was typical. The order of confirmation is, indeed, an adjudication of all the facts involved in the inquiry (Carter v. Hyatt, 76 Kan. 304, 306, 91 P. 61); but how does the question of the exempt character of land seized and sold get into the case at that time?'

"Upon consideration of the nature of the proceedings upon which property is based, this court has held that the confirmation of an execution sale does not adjudicate the validity of the sale as against a subsequent claim of invalidity for want of appraisement. See Cuff v. Koslosky, 165 Okl. 135, 25 P. (2d) 290. Upon similar consideration, it would seem that the confirmation of such a sale does not foreclose a subsequent assertion of the exempt character of the property in an appropriate action. The Kansas court so held under statutes similar to ours. Brewer et al. v. Warner, supra."

In the case of *Brazell et al.* v. *Brockins et al.*, 95 Okl. 38, 217 P. 847, the first paragraph of the Syllabus by the court is as follows:

"On a motion to confirm sale of real estate made under execution, the court should confine itself to the

regularity of the proceeding on the sale and is not required to go behind the execution and look into the regularity of the judgment."

To the same effect is the case of *Kline et al.* v. *Evans et al.*, 103 Okl. 44, 229 P. 427.

The Supreme Court of Kansas, from which state our code is taken, has interpreted this same statute providing for the confirmation of sale to the same effect as Oklahoma. This is evidenced by the case of *Brewer et al.* v. *Warner*, 105 Kan. 168, 182 P. 411, the first syllabus by the court being as follows:

"Confirmation of a sheriff's sale of land, made under a general execution issued on a judgment for debt, is not an adjudication that the land was lawfully subject to sale; and in an action by the debtor against the creditor for damages for deprivation of exempt property the debtor may show that the land was his government homestead, and that the debt was contracted before patent issued, notwithstanding confirmation of the sale."

In the opinion the court states:

"The decisions of this court are uniform and unanimous to the effect that confirmation of an execution sale does not adjudicate the fact that the land sold was lawfully subject to seizure and sale. The sheriff may sell land not subject to execution, because it belongs to a person other than the execution debtor. In that event confirmation adjudicates nothing against the owner. Capital Bank v. Buntoon, 35 Kan. 577, 11 Pac. 369, syl. 1. *Indeed, the owner is not even concluded by denial of his motion to set aside the sale, interposed before confirmation.* White-Crow v. White-Wing, 3 Kan. 276; Harrison & Willis v. Andrews, 18 Kan. 535, syl. 3; Mills v. Pettigrew, 45 Kan. 573, 26 Pac. 33, syl. 2."

An examination of the order confirming sale, (Original record pages 257 to 259), discloses that the trial court in passing upon the motion to confirm sale and objections thereto made no special findings as to the objections made by the trustee in bankruptcy, but did make specific findings as to the regularity of the various steps in the procedure of sale. So, it may be assumed that the court in that instance was guided by the foregoing authorities, which limit its jurisdiction to an inquiry as to the regularity of the sale, and the trustee in not appealing from said order of confirmation must have accepted the law as interpreted by the court in failing to appeal, because there can be no question as to the intention of the trustee to reserve his right to protest to a sale wherein the proceeds were limited to $750 as bid, and to accept and confirm the sale to this respondent, Pauline Oil & Gas Company for the sum of $2500. With the jurisdiction of court limited, issues raised outside of such jurisdiction can be of no binding effect.

PROPOSITION

The decisions of the Supreme Court of Oklahoma in interpreting the statute providing for confirmation of sale are controlling. In the instant case, in which the petitioner, Abe Fischer, in his petition for rehearing to the Supreme Court of Oklahoma, specifically raised the issue of estoppel of the order of confirmation as against this respondent, Pauline Oil & Gas Company, in its contention that the property seized was not subject to sale, the denial of such petition was a controlling determination of that particular issue.

The case of *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, held in its opinion, at page 78, U. S.:

> "Except in matters governed by the Federal Constitution, or by the acts of Congress, the law to be ap-

> plied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter for Federal concern. There is no Federal general common law."

In the case of *Freeport Water Co.* v. *City of Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. 493, the Court in its opinion on page 497, Sup. Ct., makes the following holding:

> "Acting on these principles, founded as they are on comity and good sense, the courts of the United States without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state court."

The petitioner, Abe Fischer, in his petition for rehearing before the Supreme Court of the State of Oklahoma, urged the following proposition, page 45, printed transcript:

> "The opinion overlooks the final judgment of the District Court of Pawnee County, Oklahoma, which confirmed the sheriff's sale. The objections to the sheriff's sale presented by the trustee in bankruptcy to the District Court of Pawnee County, Oklahoma, adjudicated adversely the right of the trustee in bankruptcy to the property. This matter became res adjudicata, a fact entirely undisposed of and overlooked by the opinion."

And in support of said proposition cited *Staples* v. *Jenkins et al.*, 178 Okl. 186, 62 P. (2d) 504; also, 231 U. S. 692, 58 L. ed. 440, which citations do not go to the jurisdiction of the court on hearing of motion to confirm sale.

The petitioner, Abe Fischer, in his application to the Supreme Court of Oklahoma to file second petition for re-

hearing (printed transcript, pages 46 to 49), abandoned this proposition.

From the foregoing it would appear that this proposition has been passed upon by the Supreme Court of Oklahoma in this case, and its denial of said petition for rehearing is an adverse decision upon the merits of such contention and is controlling. Neither was this proposition presented or briefed in the present hearing.

PROPOSITION

It is determined by the opinion that the respondent, Pauline Oil & Gas Company, holds under the trustee in bankruptcy as his transferee, and the trustee's acquiescence in the confirmation of sale to the respondent would seem to be at least a tacit assertion that the levy of execution did not constitute an encumbrance upon respondent's title. It is also determined by the opinion and authorities cited that Section 67 (f) of the bankruptcy act may operate for the benefit of the trustee or one claiming under him as against one claiming by virtue of the lien in a judicial proceeding wherein it is determined that at the date of the creation of the lien the bankrupt was insolvent, that the lien was acquired within four months of the filing of the petition in bankruptcy, and that the property affected was not sold to a bona fide purchaser. The instant case is such a judicial proceeding, and under the pleadings and evidence the bankrupt admittedly was insolvent at the date of the creation of the lien, the lien was acquired within four months of the filing of the petition in bankruptcy, and the property affected had been sold to Abe Fischer, who was not a bona fide purchaser. The opinion as written, therefore, with the exception as heretofore noted, should have affirmed title in the respondent, Pauline Oil & Gas Company, and approved the holding of the Supreme Court of Oklahoma.

In support of the foregoing, we quote from the opinion wherein the respondent, Pauline Oil & Gas Company, is referred to as the transferee of the trustee in bankruptcy:

"The estoppel of the judgment of the state court extended not only to him (trustee in bankruptcy) but to the respondent as his *transferee.*"

The opinion also had this to say with reference to the election of the trustee to avoid the levy on execution:

"The trustee's acquiescence in the confirmation of the sale of the respondent would seem to be at least a tacit assertion that the levy of execution did not constitute an encumbrance upon respondent's title."

As to the operation of Section 67 (f) for the benefit of the respondent, we quote from the opinion as follows:

"A number of state courts have held, and we think rightly, that the section is intended for the benefit of creditors of the bankrupt and, therefore, does not avoid liens as against all the world but only as against the trustee and those claiming under him. • • •

"Although Section 67 (f) unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, the section makes it clear that this is so only under specified conditions. At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser. Furthermore, the lien is preserved if the trustee elects to enforce it for the benefit of the estate. These conditions create issues of fact which, as between the trustee, or one claiming under him, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially."

We quote from the opinion in its statement of facts as follows:

"October 11, 1934, Geraldine Oil Company, being insolvent, assigned the property in question to a trustee for the benefit of creditors. * * *

"November 12, 1935, the sheriff sold the property, pursuant to the execution, and the petitioner bought it. A notice of the adjudication in bankruptcy was read at the sale in the presence of the petitioner."

The opinion also states, which is an undisputed fact, that the Geraldine Oil Company was adjudged a bankrupt on October 24, 1935, and the sheriff levied on the property under his execution September 13, 1935, which, of course, is within the four months' period provided for in Section 67 (f).

As to the right of Abe Fischer, petitioner, to question the title of this respondent in the property, it is material to quote from the opinion's finding that the petitioner was never in possession of the property, and this is as follows:

"Both petition and answer allege that the respondent was in possession of the property at the time suit was brought, and we may assume that the petitioner never was in possession."

In this connection, the opinion failed to comment upon the cases submitted in respondent's brief in support of the following proposition:

"Upon adjudication of bankruptcy and the appointment of trustee and assignee for the bankrupt's estate, a right of action, if any, to set aside an alleged fraudulent transfer and assignment for the benefit of creditors vests solely in the trustee and assignee. Nor does failure or refusal of the trustee to bring and prosecute an appropriate action enable the creditor, or those claiming under him, to do so."

This proposition is set forth and cases cited in support thereof on pages 5 to 8 of respondent's brief filed herein, and in the absence of any estoppel as against the respondent, Pauline Oil & Gas Company, we think should be decisive as against the petitioner's, Abe Fischer, right to attack this respondent's title, especially where petitioner has never had possession of the property. We respectfully urge the Court's examination and consideration of this on review.

We respectfully submit that the opinion should not stand; that it does not do justice to the cause; that it does not do substantial justice to the respondent; that it also would create a conflict in the law of this state as to the scope of order confirming sale on execution where none exists; and that the judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 239.—October Term, 1939.

Abe Fischer, Petitioner, *vs.* Pauline Oil & Gas Company.	On Writ of Certiorari to the Supreme Court of Oklahoma.

[February 26, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

An appeal taken in this case was dismissed for want of jurisdiction. Section 237(a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by Section 237(c), Judicial Code, as amended (43 Stat. 936, 938), we granted certiorari (308 U. S. —) because the judgment of the Supreme Court of Oklahoma[1] is based upon a construction of § 67(f) of the Bankruptcy Act of 1898,[2] which raises an important question concerning the operation of the section, not settled by decision of this court, on which state courts have reached conflicting conclusions.

The petitioner brought action to quiet his title to an oil and gas lease and to gain possession of the leased premises together with materials, machinery, tools, and appliances thereon, and for mesne profits, and damages. His claim was based on a sheriff's deed consummating an execution sale under a judgment entered upon an award of the State Industrial Commission against Geraldine Oil Company. The respondent's title was derived through a conveyance by an assignee for the benefit of creditors of the same company, confirmed by a bankruptcy court. The respondent cross-petitioned for a judgment declaring the sheriff's sale to petitioner void and quieting respondent's title. The trial court directed a verdict for

[1] Pauline Oil & Gas Co. *v.* Fischer, 185 Okla. 108; 90 Pac. (2d) 411.

[2] 11 U. S. C. § 107(f). The provisions of §67(f) of the Bankruptcy Act of 1898 are now carried over into, modified and clarified by chapter VII, § 67a, (1), (2), (3) and (4) of the Chandler Act of June 22, 1938, 52 Stat. 840, 875. The question here presented, however, may arise under the later act.

petitioner and entered judgment thereon, which the Supreme Court reversed.

August 30, 1934, the Commission made an award to one Rainbolt against Snyder, as employer, and Geraldine Oil Company, as owner of the property. For payment of the award Geraldine Oil Company was secondarily liable.

October 11, 1934, Geraldine Oil Company, being insolvent, assigned the property in question to a trustee for the benefit of creditors.

December 8, 1934, the award in favor of Rainbolt was filed of record in a State District Court and became a judgment of that court.

January 21, 1935, the assignee for the benefit of creditors sold the property to the respondent.

September 13, 1935, execution issued on the Rainbolt judgment, and, September 17th, the sheriff levied on the property as property of the Geraldine Oil Co. The execution was issued on the theory that the assignment for the benefit of creditors was invalid, and the property, therefore, remained that of the assignor.[3]

October 24, 1935, Geraldine Oil Company was adjudged a voluntary bankrupt in the District Court of the United States for Western Oklahoma.

November 12, 1935, the sheriff sold the property, pursuant to the execution, and the petitioner bought it. A notice of the adjudication in bankruptcy was read at the sale in the presence of the petitioner. On the same day the sheriff made return of the sale to the court out of which the execution issued.

November 21, 1935, the trustee in bankruptcy filed in that court his objections to the confirmation of the sheriff's sale, alleging, *inter alia*, that Geraldine Oil Company was insolvent when Rainbolt obtained judgment and had been so ever since; that the company had been adjudicated a bankrupt within four months of the securing of the lien under the execution, and that, by virtue of § 67(f) of the Bankruptcy Act, the lien was absolutely void.

March 28, 1936, the court ordered that the sale be confirmed and granted the trustee in bankruptcy an exception to its action. The latter gave notice of appeal to the Supreme Court of Oklahoma, but it does not appear that he perfected an appeal. The order of confirmation was entered of record April 22, 1936.

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[3] See Wells v. Guaranty State Bank, 56 Okla. 688, 156 Pac. 896; First State Bank v. Bradshaw, 174 Okla. 268, 51 P. (2d) 514.

June 4, 1936, the respondent petitioned the United States District Court for confirmation of the sale of the property made to the respondent by the assignee for the benefit of creditors on January 21, 1935. The trustee in bankruptcy objected, but subsequently withdrew his objections and the referee made an order confirming the sale. The assignee then paid to the trustee the consideration received by him from the respondent as purchaser at the assignee's sale. It does not appear that the petitioner had notice of the application or was present at the hearing.

June 10, 1936, the sheriff delivered a deed to the petitioner as purchaser at the execution sale.

Both petition and answer allege that the respondent was in possession of the property at the time suit was brought, and we may assume that the petitioner never was in possession.

The Supreme Court held that entry of the Commission's award in the State Court made it a judgment of that court; that such judgment did not constitute a lien on the property of Geraldine Oil Company in question; and that no lien was acquired until the levy of execution on September 17, 1935, about a month prior to the adjudication of the company as a bankrupt.

The respondent asserted that, as the judgment in favor of Rainbolt was not a lien when Geraldine Oil Company assigned for the benefit of creditors, or when the assignee sold the property to the respondent, its title must prevail; and, in the alternative, that the same result must follow from the fact that since the lien of the levy was obtained less than four months prior to the filing of the petition in bankruptcy, it was voided by § 67(f).

The Supreme Court stated that, if either of these contentions were sound, the petitioner could not prevail. It expressly declined to consider the efficacy of the sale by the assignee for the benefit of creditors to pass title to the respondent clear of the lien of the subsequent levy, and rested its decision upon its view of the effect of § 67(f). Since the judgment is based exclusively upon a federal ground, we have jurisdiction.

§ 67(f) provides:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, ... shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy,

judgment, attachment, or other lien, . . . shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The court held that the section, *proprio vigore*, nullified the lien of the levy so that the property passed to the trustee discharged thereof, and concluded that, since, at the time of the sheriff's sale, the property was discharged of the lien, the sale, and the deed delivered pursuant to it, were void; and, as a trustee's sale would pass title clear of the lien, the same result would follow from the bankruptcy court's validation, with the trustee's consent, of the assignee's sale previously made.

The question is whether the state court was right in holding that, by force of §67(f), the adjudication in bankruptcy automatically discharged the lien of the levy, irrespective of any action on the part of the trustee. Expressions supporting this view may be found in cases decided by federal courts,[4] and statements squinting in the same direction have been made by this court.[5] In none of these instances, however, was the litigation between third parties, or between the lienor or one claiming title under an execution sale, and an opponent deriving title from the trustee in bankruptcy. In all of them a bankruptcy receiver or trustee instituted action in the bankruptcy court or some other court, or became a party to the proceeding in which the lien was acquired, to avoid the lien, or the bankrupt brought suit to avoid the lien as to property set apart to him as exempt in the bankruptcy case.

Some state courts have definitely held that the adjudication operates automatically to nullify the lien which must be treated as void whenever and wherever drawn into question, either in a direct

[4] In re Tune, 115 Fed. 906; In re Beals, 116 Fed. 530; In re Federal Biscuit Co., 214 Fed. 221, 224.

[5] Clarke v. Larremore, 188 U. S. 486, 488; Chicago, B. & Q. R. Co. v. Hall, 229 U. S. 511, 514; Lehman Stern & Co. v. S. Gumble & Co., 236 U. S. 448, 454.

or a collateral proceeding, and whether the trustee in bankruptcy has taken the property into his possession or abandoned it.[6]

On the other hand, it was said in *Taubel-Scott-Kitzmiller Co.* v. *Fox, et al.*, 264 U. S. 426, 429: "For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy." The court there pointed out that a number of issues of fact must be resolved before it can be determined that the lien is void. And, in *Pigg & Son* v. *United States*, 81 F. (2d) 334, 337, it was held that liens obtained in judicial proceedings within four months of the filing of the petition are not void, but voidable in a proper suit, and that the property affected by the lien does not automatically pass to the trustee, discharged of the lien.

In *Connell* v. *Walker*, 291 U. S. 1, 3, this court indicated that the operation of § 67(f) is not automatic, since the trustee in bankruptcy has an election either to avoid the lien, or to be subrogated to it for the benefit of the bankrupt estate.

A number of state courts have held, and we think rightly, that the section is intended for the benefit of creditors of the bankrupt and, therefore, does not avoid liens as against all the world but only as against the trustee and those claiming under him.[7] It is settled, however, that not only may the trustee avoid the lien (*Taubel-Scott-Kitzmiller Co.* v. *Fox, et al., supra; Connell* v. *Walker, supra*), but that the bankrupt may assert its invalidity as respects property set apart to him as exempt in the bankruptcy proceeding. *Chicago, B. & Q. R. Co.* v. *Hall*, 229 U. S. 511. But the lien is not avoided for the benefit of the bankrupt save as to his exempt property or nullified as respects other lienors or third parties.[8]

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[6] Mohr v. Mattox, 120 Ga. 962; Hobbs v. Thompson, 160 Ala. 360; Finney v. Knapp Co., 145 Ga. 400; Greenberger v. Schwartz, 261 Pa. 265; Archenhold Co. v. Schaefer, 205 S. W. 139 (Tex. Civ. App.); Morris Fertiliser Co. v. Jackson, 27 Ga. App. 567; Mack v. Reliance Ins. Co., 52 R. I. 402; Whittaker v. Bacon, 17 Tenn. App. 97; Bank of Garrison v. Malley, 103 Tex. 562. Compare, Kellogg-Mackay-Cameron Co. v. Schmidt Baking Co., 101 Ill. App. 209; Keystone Brewing Co. v. Schermer, 241 Pa. 361; Lamb v. Kelley, 97 W. Va. 409.

[7] France v. Nelson, 179 Mass. 456; Swaney v. Hasara, 164 Minn. 416; Hutchins v. Cantu, 66 S. W. 138 (Tex. Civ. App.); Equitable Credit Co. v. Miller, 164 Ga. 49; Neugent Garment Co. v. U. S. F. & G. Co., 202 Wisc. 93.

[8] See the cases in Note 7, *supra*, and McCarty v. Light, 155 App. Div. (N. Y.) 36; Travis v. Bixler Co., 66 P. (2d) 1263 (Cal. App.); Danby Millinery Co. v. Dogan, 47 Tex. Civ. App. 323; Smith v. First National Bank, 76 Colo. 34; Taylor v. Buser, 167 N. Y. Supp. 887.

Although § 67(f) unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, the section makes it clear that this is so only under specified conditions. At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser. Furthermore, the lien is preserved if the trustee elects to enforce it for the benefit of the estate. These conditions create issues of fact which, as between the trustee, or one claiming under him, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially. The courses open to the trustee under the Bankruptcy Act of 1898 were to proceed to have the lien declared void, by plenary suit,[9] or by intervention in the court where it was obtained,[10] or by applying, in the bankruptcy cause, to restrain enforcement,[11] as might be appropriate in the circumstances.

In the instant case the trustee intervened in the state court and opposed the confirmation of the execution sale on the ground that § 67(f) had avoided and discharged the lien of the levy. The issue was decided against him and he did not appeal. Later, when the respondent, who had purchased at the assignee's sale, asked the bankruptcy court to confirm that sale, the trustee withdrew his objections to confirmation and accepted from the assignee the consideration received from the respondent as purchaser at the latter's sale. The trustee's acquiescence in the confirmation of the sale to the respondent would seem to be at least a tacit assertion that the levy of the execution did not constitute an encumbrance upon respondent's title. But we think, if in other circumstances the trustee's conduct could amount to an election to avoid the lien, it can have no such effect here, in view of the prior decision against him on that issue in the state court.

We are of opinion that the trustee, having raised the issue in the state court, was bound by the final decision of that tribunal. The

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[9] See Taubel-Scott-Kitzmiller Co. v. Fox, *supra*.

[10] 11 U. S. C. § 29(b). See Lehman Stern & Co. v. S. Gumbel & Co., 236 U. S. 443; Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734.

[11] Clarke v. Larremore, 188 U. S. 486. The Chandler Act, § 67a(4), 52 Stat. 876, vests summary jurisdiction in the bankruptcy court to hear and determine, after notice to the parties in interest, all questions affecting the validity of the lien.

estoppel of the judgment of the state court extended not only to him but to the respondent as his transferee. This conclusion requires reversal of the judgment.

We do not pass upon the question whether the title of the respondent, derived from the sale of the property to it by the assignee for the benefit of creditors, is, by virtue of that sale, superior to the title of the petitioner. This is a question of state law which the court below remains free to decide.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.